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Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9 of the United States Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have exhausted such review.

5. Whether petitioners' detention is lawful.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 476 F.3d 981.[1] The opinions of the district

[1] Unless otherwise noted, all references to "Pet.," "Pet. App.," and "Br." are to the petition, appendix, and petitioners' brief in No. 06-1195.

court are reported at 355 F. Supp. 2d 311 (Pet. App. 51a-79a), and 355 F. Supp. 2d 443 (06-1196 Pet. App. 61-127).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petitions for a writ of certiorari were filed on March 5, 2007, and granted on June 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In response to the attacks of September 11, 2001, Congress approved the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. The President ordered the Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although our troops have removed the Taliban from power, armed combat with al Qaeda and the Taliban remains ongoing. In connection with those conflicts, the United States has seized many hostile persons and detained a small fraction of them as enemy combatants. Approximately 340 of these enemy combatants are being held at the U.S. Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is a foreign national.

2. a. With the exception of two recently arrived detainees, every Guantanamo Bay detainee has received a hearing before a military Combatant Status Review Tribunal (CSRT). Those tribunals were created "to determine, in a fact-based proceeding, whether the individuals detained * * * are properly classified as enemy

combatants and to permit each detainee the opportunity to contest such designation." 06-1196 Pet. App. 147.

During the CSRT proceedings, each detainee received procedural protections modeled on an Army regulation (U.S. Dep't of the Army et al., *Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Nov. 1, 1997) (Army Reg. 190-8)), which specifies procedures for determining the status of detainees under the Geneva Convention. Among other things, the CSRT procedures provided for each detainee to receive notice of the unclassified factual basis for his designation as an enemy combatant, as well as an opportunity to testify, call reasonably available witnesses, and present relevant and reasonably available evidence. 06-1196 Pet. App. 143-144. They also provided that each detainee would receive assistance from a military officer designated as his "personal representative." *Id.* at 141. Another military officer, the recorder of each tribunal, was charged with presenting evidence regarding whether the detainee should be designated as an enemy combatant, including evidence that the detainee should *not* be so designated. *Id.* at 165. Each tribunal consisted of three military officers sworn to render an impartial decision and who were not "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." *Id.* at 142. And each tribunal decision was subject to mandatory review first by the CSRT Legal Advisor and then by the CSRT Director. *Id.* at 163-164. The CSRT process has led to determinations that 38 now-released detainees were no longer enemy combatants. See *Combatant Status Review Tribunal Summary* (visited Oct. 9, 2007) <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf> (*CSRT Summary*).

In addition to the CSRT review process, the Department of Defense also conducts an annual administrative examination of whether it is appropriate to release or repatriate an enemy combatant. The 328 administrative reviews conducted in 2006 resulted in determinations that 55 detainees (roughly 17%) should no longer be detained at Guantanamo Bay. See Office of the Asst. Sec'y of Def. (Pub. Affairs), U.S. DoD, *Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials* (Mar. 6, 2007) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>. Since 2002, about 390 detainees have been transferred or released through this or other processes. See *ibid.* Today, approximately 340 detainees remain at Guantanamo Bay.

b. Each detainee's enemy combatant determination is based on a specific record unique to his case, and most of the CSRT conclusions are based in significant part on classified information. The CSRT decision reports were included in the factual returns to the habeas petitions and are part of the district court record.

3. Habeas corpus petitions have been filed on behalf of numerous Guantanamo Bay detainees. In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that district courts had jurisdiction under 28 U.S.C. 2241 to consider habeas petitions filed by detainees at Guantanamo Bay. The Court reasoned that the statutory holding of *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), had implicitly rested on the narrow construction of the habeas statute adopted in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), which did not survive the Court's decision in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). See *Rasul*, 542 U.S. at 477-479. Accordingly, this Court had no occasion to revisit *Eisentrager*'s constitutional holding and

instead concluded, as a statutory matter, that Section 2241 "confer[red] * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 484. The Court emphasized that it had decided "only whether the federal courts have jurisdiction," and not "the merits of petitioners' claims." *Id.* at 485.

4. After the remand in *Rasul*, numerous other Guantanamo Bay detainees filed habeas petitions. Their actions include 13 cases, involving more than 60 detainees, which were coordinated in the district court for limited procedural purposes. Respondents moved to dismiss the claims of each detainee. The district court, acting on eleven of the consolidated cases, granted the motions in part and denied them in part, concluding that Due Process Clause of the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient. 06-1196 Pet. App. 61-127 (Green, J.). The district court, acting on two other cases, granted the motions to dismiss in full, holding that the petitioners' detention was authorized by the AUMF, and that the Constitution does not protect aliens outside sovereign United States territory, including at Guantanamo Bay. Pet. App. 51a-79a (Leon, J.). Both decisions were appealed.

5. While these appeals were pending, Congress—recognizing that detainee litigation was consuming enormous resources and disrupting the operation of the Guantanamo Bay Naval Base—enacted the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to con-

sider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the DTA provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. § 1005(e)(3)(A), 119 Stat. 2743; see Military Commission Order No. 1 (DoD Aug. 31, 2005) <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

6. Several months later, this Court decided *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that Section 1005(e)(1), the jurisdiction-removing provision of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *id.* at 2762-2769. In reaching that conclusion, the Court observed that the statute made the exclusive-review provisions in Section 1005(e)(2) and (3) of the DTA "expressly * * * applicable to pending cases." *Id.* at 2764 (citing DTA § 1005(h)(2), 119 Stat. 2743). The Court noted the absence of such language regarding Section 1005(e)(1),

and therefore drew a "negative inference" as to Congress' intent to apply Section 1005(e)(1) to pending cases. *Id.* at 2766.

7. In the wake of this Court's decision in *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA, 120 Stat. 2635, amends 28 U.S.C. 2241(e) to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. 2636. Section 7(a) also eliminates federal court jurisdiction, except as provided by Section 1005(e)(2) and (3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. *Ibid.* The MCA provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." § 7(b), 120 Stat. 2636.

8. On February 20, 2007, the court of appeals dismissed these cases for lack of jurisdiction.

a. The court of appeals observed that each of petitioners' pending habeas cases "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001." Pet. App. 6a. The court concluded that the MCA applies to those cases and

eliminates federal court jurisdiction over the petitions. *Id.* at 6a-9a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, U.S. Const. Art. I, § 9, for two independent reasons. First, the court noted that the Suspension Clause "protects the writ 'as it existed in 1789,'" Pet. App. 10a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property in the United States," *id.* at 12a-13a. Second, the court held that, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause. The court observed that in *Eisentrager*, this Court "rejected the proposition 'that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses.'" *Id.* at 14a (quoting *Eisentrager*, 339 U.S. at 783); see *id.* at 15a (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), and *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001)).

The court of appeals also held that petitioners' suggestion that this Court's decision in *Rasul* overruled the constitutional holding in *Eisentrager* was mistaken. Pet. App. 13a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 15a n.10, in which this Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA eliminates jurisdiction in petitioners' cases, the court vacated the district

courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 19a-20a.

b. Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that the Military Commissions Act does not violate the Suspension Clause. Petitioners are aliens with no connection to this country who were captured abroad in the course of an ongoing military conflict and who have at all times been detained outside the sovereign territory of the United States. They have had the benefit of a legal proceeding—employing procedures authorized by Congress—to review their status, and they have been adjudged to be enemy combatants. In addition, they have the right to challenge those status determinations before the District of Columbia Circuit and may seek further review in this Court if they do not prevail in the court of appeals. Petitioners, along with the other enemy combatants being held at Guantanamo Bay, enjoy more procedural protections than any other captured enemy combatants in the history of warfare.

The court of appeals properly rejected petitioners' claims that they are entitled to greater procedural protections than those afforded by the military and authorized by Congress. First, as aliens held outside the sovereign territory of the United States, petitioners may

not invoke the protections of our Constitution, including those guaranteed by the Suspension Clause. That conclusion is alone compelled by *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), and its progeny, and there is no basis to upset that longstanding constitutional rule here.

Second, even if petitioners could assert rights under the Suspension Clause, their claims would be unavailing. The baseline for reviewing Suspension Clause claims is the writ that existed in 1789. Because the common-law writ of habeas corpus would not have extended to alien enemy combatants held outside the territory of the United States, either in 1789 or at any later date, petitioners cannot show the deprivation of any interest protected by the Suspension Clause.

Third, even if petitioners could show a historical precedent for habeas corpus in the extraordinary circumstances here, Congress has afforded them a constitutionally adequate substitute for challenging their detention. Although Congress expressly chose to foreclose detainees from challenging their status via habeas, it decided that aliens detained at Guantanamo Bay as enemy combatants should receive administrative hearings before a military tribunal, subject to judicial review in the District of Columbia Circuit. That system builds additional protections upon those that are available even to conventional prisoners of war under the Geneva Convention, and it was designed to track the requirements for due process deemed sufficient for American citizens in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

The laws that establish that system—the Military Commissions Act and the Detainee Treatment Act—represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate "the weighty and sen-

sitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at 531 (plurality opinion). And the laws reflect precisely the kind of consultation between the President and Congress that "strengthens the Nation's ability to determine—through democratic means—how best" to confront national security threats during an ongoing military conflict. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

11. There is no reason for this Court to pass on the merits of petitioners' detention before the lower court has done so. In any event, if the Court does review the merits of petitioners' detention in this case, it should hold that their detention is lawful. Congress has authorized the President to use "all necessary and appropriate force" against those "organizations" that "he determines" committed the terrorist attacks of September 11, 2001. Al Qaeda is such an organization, and this Court squarely held in *Hamdi* that detention is part and parcel of the force authorized by Congress. See 542 U.S. at 518 (plurality opinion). Petitioners are properly detained because they have been determined by a military tribunal to be "part of or supporting Taliban or al Qaida forces." Pet. App. 81a. Petitioners may challenge that determination under the procedures authorized by Congress, but they have provided no basis for upsetting that determination at this preliminary stage.

ARGUMENT

Four Terms ago, in *Rasul* v. *Bush*, 542 U.S. 466 (2004), a group of Guantanamo Bay detainees—including the Al Odah petitioners here—came to this Court claiming through a habeas corpus action a right to military

review of their enemy combatant designations under a process modeled on Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140 (Geneva Convention or Convention). As their counsel proclaimed at oral argument, their request was modest, and if they were provided such military review, they "would not" be here. Tr. Oral Arg. at 10, *Rasul*, *supra* (No. 03-343).[2] Since then, these same detainees—like the other Guantanamo Bay detainees—have received an opportunity to contest their enemy combatant status before a military tribunal that affords protections *greater* than those outlined by Article 5 of the Geneva Convention, and have been granted by Congress a statutory right to challenge such status determinations in court. The detainees now enjoy greater procedural protections and statutory rights to challenge their wartime detentions than any other captured enemy combatants in the history of war. Yet they claim an entitlement to more. That contention should be rejected, and petitioners should be directed to raise their claims through the unprecedented review procedures established by Congress.

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[2] The *Al Odah* petitioners represented to the Court in *Rasul*, *supra*, that they sought only a military tribunal process to determine the validity of their detention, and "have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States." Al Odah Reply Br. at 13 (No. 03-343); see Tr. Oral Arg. at 9-10, 15, 18-19 (No. 03-343).

I. THE MILITARY COMMISSIONS ACT OF 2006 VALIDLY DIVESTED THE DISTRICT COURT OF JURISDICTION OVER PETITIONERS' HABEAS CORPUS PETITIONS

In the MCA, Congress plainly and unambiguously removed jurisdiction over habeas corpus petitions filed on behalf of aliens held at Guantanamo Bay as enemy combatants, MCA § 7, 120 Stat. 2635, and substituted in its place a review scheme that permits such detainees to challenge their CSRT enemy combatant determinations in a petition to the District of Columbia Circuit.[3] Petitioners contend that they have a constitutional right under the Suspension Clause to pursue relief in habeas corpus that trumps the scheme established by Congress. For several independent reasons, the court of appeals properly rejected that contention. First, as aliens held outside the sovereign territory of the United States, petitioners enjoy no rights under the Suspension Clause. Second, even if they could invoke the Suspension Clause, it would not entitle them to relief because they seek an expansion of the writ well beyond its historic scope. And third, the DTA in any event provides an adequate alternative to any habeas rights petitioners may have.

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[3] Some of the petitioners contend (Br. 10 n.6; Al Odah Br. 26-29; but see El-Banna Br. 29-30) that the MCA does not apply to pending cases. That claim lacks merit. Section 7(a) amends 28 U.S.C. 2241 to eliminate jurisdiction over any petition for a writ of habeas corpus filed by an alien detained as enemy combatant. MCA § 7(a), 120 Stat. 2635. And Section 7(b) provides that Section 7(a) "shall take effect on the date of the enactment of this Act" and "shall apply to all cases, without exception, pending on or after the date of enactment of this Act." MCA § 7(b), 120 Stat. 2636. As the court of appeals observed, the statute "could not be clearer." Pet. App. 7a. "It is almost as if the proponents of these words were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'" *Ibid.*

A. As Aliens Held Outside The Sovereign Territory Of The United States, Petitioners Do Not Enjoy Any Rights Under The Suspension Clause

Petitioners' constitutional claim fails at the outset because, as aliens outside the sovereign territory of the United States, petitioners do not fall within the ambit of the Suspension Clause. See Pet. App. 14a-19a. "[C]onstitutional protections" must be interpreted "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). The text and history of the Suspension Clause demonstrate that it does not confer rights on enemy combatants seized by our military and held abroad, and this Court's precedents confirm that such aliens have no constitutional right to petition our courts for a writ of habeas corpus.[4]

[4] Petitioners argue (El-Banna Br. 16-18) that the Suspension Clause is a structural provision that limits Congress's authority without regard to whether petitioners have constitutional rights. The court of appeals correctly rejected that argument. Pet. App. 17a-19a. Petitioners' theory is inconsistent with the text of the Suspension Clause, which refers to the "Privilege of the Writ of Habeas Corpus." U.S. Const. Art I, § 9, Cl. 2. The term "privilege" is more consistent with the language in several of the Bill of Rights provisions, such as the Fourth Amendment. See, *e.g.*, *id.* Amend. IV (protecting "[t]he right of the people" to be free from unreasonable searches and seizures). In interpreting that provision, this Court rejected the suggestion that it worked as a structural constraint and therefore applied globally. See *Verdugo-Urquidez*, 494 U.S. at 270. But even if the extraterritorial reach of the Suspension Clause does not stand or fall with the extraterritorial reach of the Bill of Rights, it does not assist petitioners. Petitioners' argument is contradicted by this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), where the Court held that overseas military detainees lacked the constitutional right to petition for habeas corpus. See *id.* at 777.

1. Text and history demonstrate that the Suspension Clause has only domestic application

The framers recognized that wartime exigencies might require the suspension of habeas corpus. They therefore authorized suspension of the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2. Significantly, both of those exigencies—rebellion and invasion—pertain to wartime conditions *within* the United States. Nor can there be any doubt but that the "public safety" referred to in the Clause refers to safety at home rather than abroad. The Suspension Clause does not speak to the application of the writ in the context of military operations abroad. That omission is powerful evidence that the protection afforded by the Suspension Clause does not extend to overseas detentions of aliens in the first place. It would be absurd for Congress to have the power to suspend the writ within the United States but to lack any such authority, regardless of exigency, as to military operations on foreign soil.

The "Rebellion" and "Invasion" language of the Suspension Clause parallels that of the provision authorizing Congress to employ the militia. Congress may "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," U.S. Const. Art. I, § 8, Cl. 15—all of which occur domestically. See *Authority of the President to Send Militia into a Foreign Country*, 29 Op. Att'y Gen. 322 (1912); cf. *Perpich* v. *DoD*, 496 U.S. 334 (1990).

By contrast, the powers of Congress to "declare War" and create an army and a navy, see U.S. Const. Art. I, § 8, Cls. 11-13, and the power of the President as "Commander in Chief of the Army and Navy," *id.* Art. II, § 2, Cl. 1, are not geographically limited. The army

and navy routinely operate beyond our borders, and, when doing so, they are not governed by the same constitutional restrictions that apply domestically. For example, in 1798, Congress enacted a statute authorizing the seizure of French ships on the high seas. See Act of July 9, 1798, ch. 68, 1 Stat. 578. The statute directed that all "French persons and others" aboard the seized ships "be delivered to the custody of the marshal, * * * who shall take charge for their safe keeping," and it provided no avenue for judicial review of such "custody," whether through habeas or otherwise. § 8, 1 Stat. 580. In *Verdugo-Urquidez*, this Court cited that statute's authorization of seizures as evidence that the framers did not understand the Fourth Amendment to "apply to activities of the United States directed against aliens in foreign territory." 494 U.S. at 267. The statute's authorization of "custody" likewise demonstrates that the framers did not understand the Suspension Clause to limit the authority of Congress to order the imprisonment of enemy aliens captured on the high seas.

The founders recognized that the Constitution needed to make allowances for the special circumstances of the military and the possibility of invasion where it did apply. Accordingly, not only does the Suspension Clause allow suspension in cases of invasion or rebellion, but the Fifth Amendment limits its application "in cases arising in the land or naval forces." Equally important, the Constitution makes allowances for military operations abroad by limiting its reach. Then-Representative John Marshall raised both these points in his floor speech on the extradition of Thomas Nash:

> The clause of the Constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed

> in the land and naval forces of the United States. Had such a construction prevailed, it would most probably have prostrated the Constitution itself, with the liberties and independence of the nation, before the first disciplined invader who should approach our shores. * * * If, then, this clause does not extend to offences committed in the fleets and armies of the United States, how can it be construed to extend to offences committed in the fleets and armies of Britain or of France, or of the Ottoman or Russian Empires?

10 Annals of Cong. 611-612 (1800), *reprinted in* 18 U.S. (5 Wheat.) 1 App. at 24. Accord *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950) ("Can there be any doubts that our foes would also have been excepted [from the reach of the Fifth Amendment], but for the assumption 'any person' would never be read to include those in arms against us?"); *Ex parte Quirin*, 317 U.S. 1, 41 (1942) (*Quirin*) (concluding that the Fifth and Sixth Amendments did not guarantee rights to enemy combatants tried by military commissions even on the assumption that the military commissions there did not arise in the land forces and observing: "No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms.").

Ultimately, the founders expected that the Congress and President, together, would determine the appropriate process for individuals detained overseas during military operations—just as those political branches together share in important respects responsibility for the national defense and the constitutionally conferred war powers. See *The Federalist No. 26*, at 168 (Alexander Hamilton) (C. Rossiter ed., 1961) ("The idea of restraining the legislative authority in the means of pro-

viding for the national defense is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened."). There is no evidence that the framers intended such foreign military operations to be governed by the strictures of the Suspension Clause.[5]

2. Eisentrager *confirms that the Suspension Clause does not confer rights on aliens held abroad*

In *Eisentrager*, this Court held that aliens detained as enemies outside the United States are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." 339 U.S. at 777. That constitutional holding is controlling here and should not be overruled.

a. In rejecting a claim that alien prisoners in U.S.-occupied Germany were constitutionally entitled to habeas, the Court in *Eisentrager* emphasized two key facts. First, the petitioners were aliens who lacked any voluntary connection to the United States. As the Court explained, "our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens." 339 U.S. at 769. Accord *Verdugo-*

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[5] Even as to the first territories and possessions acquired by the United States, Congress believed that it was necessary to specify affirmatively that habeas rights would be conferred upon inhabitants thereof. See, *e.g.*, Northwest Territory Ordinance of 1787, Art. II, 1 Stat. 52 (specifying that "inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus"); Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 284 (Louisiana Territory); Act of Mar. 30, 1822, ch. 13, § 10, 3 Stat. 658 (Florida Territory); see also *Downes* v. *Bidwell*, 182 U.S. 244, 279 (1901). That is strong evidence that, in the early days of the United States, it was understood that affirmative congressional action was needed to entitle inhabitants of areas beyond the borders of the continental United States to the privilege of habeas corpus. Cf. *Sere* v. *Pitot*, 10 U.S. (6 Cranch) 332 (1810).

Urquidez, 494 U.S. at 275 (Kennedy, J., concurring) ("The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."); 10 Annals of Cong. at 611 (statement of Rep. John Marshall on the extradition of Thomas Nash), *reprinted in* 18 U.S. (5 Wheat) at 23 App. (noting, with respect to the Sixth Amendment, "certainly this clause in the Constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world").

Second, "at no relevant time" were the petitioners "within any territory over which the United States is sovereign." *Eisentrager*, 339 U.S. at 778. The Court observed that "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment" at the time of the framers. *Id.* at 784. But "[n]ot one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it." *Ibid.* (citation omitted); see *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."); *In re Ross*, 140 U.S. 453, 464 (1891).

The Court recognized that extension of the writ to alien enemies held abroad would "hamper the war effort and bring aid and comfort to the enemy." *Eisentrager*, 339 U.S. at 779. Indeed, "[i]t would be difficult to devise

a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

This Court has repeatedly reaffirmed *Eisentrager*'s constitutional holding. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). Instead, this Court has declared, aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271.

Likewise, the courts of appeals have consistently applied those precedents in various contexts. See, *e.g.*, *People's Mojahedin Org. of Iran* v. *United States Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (*People's Mojahedin*) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."), cert. denied, 529 U.S. 1104 (2000). And with respect to aliens detained at Guantanamo Bay specifically, the Eleventh Circuit has stated that aliens there "have no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428, cert. denied, 515 U.S. 1142, and 516 U.S. 913 (1995).

b. *Eisentrager* compels the conclusion that petitioner lack rights under the Suspension Clause. It is undisputed that petitioners are aliens who have no voluntary connections to the United States and who were seized abroad. They have not "accepted [any] societal obligations," *Verdugo-Urquidez*, 494 U.S. at 273, and

their only previous "connection" to this country is that they have been part of forces who are hostile to it. In addition, petitioners have at all times been detained outside the United States, and they are currently being held at Guantanamo Bay, Cuba, an area that is not a sovereign territory of the United States. See pp. 33-36, *infra*. Thus, as in *Eisentrager*, "these prisoners at no relevant time were within any territory over which the United States is sovereign." 339 U.S. at 778; cf. *Verdugo-Urquidez*, 494 U.S. at 269 (aliens are not "entitled to Fifth Amendment rights outside the sovereign territory of the United States").

Petitioners note (Br. 17) that the *Eisentrager* petitioners were determined by a military tribunal to have been "actual enemies" of the United States. 339 U.S. at 778. The same is true here. As in *Eisentrager*, each petitioner has had "access to [a] tribunal," *Rasul*, 542 U.S. at 476—*i.e.*, the CSRT—and has been individually determined to be an "actual enem[y]." *Eisentrager*, 339 U.S. at 778. Indeed, the petitioners here have *more* process available to them than the petitioners in *Eisentrager* because they may challenge those tribunal determinations in a United States court. That sets the present juncture of this litigation apart from *Rasul*, where the detainees had been "without benefit of any legal proceeding to determine their status" and therefore could not "show that they were 'of friendly personal disposition' and not enemy aliens." *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring in the judgment).[6] As in

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[6] *Eisentrager* involved an effort to review the imposition of criminal punishment on enemy detainees, whereas here petitioners are seeking review of the legality of detention only. The review of enemy-combatant detention determinations is even more likely to "hamper the war effort," 339 U.S. at 779, given the much greater number of such deten-

Eisentrager, but unlike *Rasul*, petitioners have "already been subject to procedures establishing their status," *id.* at 488 (Kennedy, J., concurring in the judgment), and so *Eisentrager* fully supports the conclusion that they have no constitutional right to the writ, especially when a statutory substitute is provided.

c. While adopting petitioners' position would require overruling *Eisentrager*'s constitutional holding, petitioners "fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring in part and concurring in the judgment). That is a sufficient basis for declining to overrule a precedent, see *id.* at 2500-2501 (Alito, J.), especially one as longstanding and recently reaffirmed as *Eisentrager*. Moreover, consideration of the relevant factors underscores that there is no basis for overruling *Eisentrager*. As this Court has observed, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned*

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tions and the fact that they occur throughout the conflict, unlike efforts at punishment which often are delayed until the end of the entire conflict. See *In re Yamashita*, 327 U.S. 1, 12 (1946). Additionally, the courts have traditionally had a greater role in reviewing the imposition of criminal penalties. See, *e.g.*, MCA § 3(a)(1), 120 Stat. 2622 (to be codified at 10 U.S.C. 950g (2006)) (judicial review of military commission proceedings). International law likewise recognizes that criminal sanctions call for more procedural protections than wartime detention determinations. Compare Geneva Convention Art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (providing that prisioner of war status is to be "determined by a competent tribunal"), with *id.* Arts. 82-108, 6 U.S.T. at 3382-3400, 75 U.N.T.S. at 200-218 (procedures for imposing criminal punishment upon prisoners of war); cf. Salim Hamdan Amicus Br. 6.

Parenthood v. *Casey*, 505 U.S. 833, 854 (1992). And "[e]ven in constitutional cases," *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM*, 517 U.S. 843, 856 (1996) (citation omitted).

Here, all of the traditional *stare decisis* factors counsel strongly against overruling *Eisentrager*. The rule in *Eisentrager* "has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which" the Suspension Clause does not operate. *Casey*, 505 U.S. at 855 (citation omitted). To the contrary, by making the application of constitutional rights turn on the easily administrable test of sovereignty, *Eisentrager* is far more workable than any alternative "*de facto* control" rule. See p. 25, *infra*. Moreover, compelling reliance interests counsel against overruling *Eisentrager*. Cf. *Casey*, 505 U.S. at 855-856. There is perhaps no greater reliance interest than the interest of the Executive in relying on this Court's constitutional decisions in the conduct of military and foreign affairs.

Likewise, "[n]o evolution of legal principle" has undermined the doctrinal foundations of *Eisentrager*. *Casey*, 505 U.S. at 857. Just the opposite is true. Since *Eisentrager*, this Court has repeatedly reaffirmed the proposition "that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693; see *Verdugo-Urquidez*, 494 U.S. at 269. And in *Rasul*, 542 U.S. at 478-479, this Court went out of its way to make clear that it was not upsetting *Eisentrager*'s constitutional holding, and its conclusion that *Eisentrager*'s statutory holding had been

superseded was based on a decision, *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973), that did not touch on *Eisentrager*'s constitutional holding.[7] There is, in short, no basis for overruling *Eisentrager*, either expressly or by necessary implication.

3. Indeterminate concepts of "jurisdiction" and "control" do not extend the Suspension Clause beyond United States territory

Petitioners assert (Br. 16; El-Banna Br. 20-25) that *Eisentrager*'s constitutional holding is inapplicable here on the theory that the United States exercises complete control over Guantanamo Bay. That is incorrect. The constitutional holding of *Eisentrager* turned on territorial sovereignty rather than indeterminate notions of control or jurisdiction. That is clear not only from the language of Justice Jackson's opinion, see 339 U.S. at 778, but also from the facts. After all, the military certainly had control over the Landsberg prison in post-war Germany in 1950. See *id.* at 766. And finding *Eisentrager* inapplicable to areas under United States "con-

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[7] In contending (Br. 15-18; Al Odah Br. 24-26) that *Eisentrager* does not govern in the wake of this Court's decision in *Rasul*, petitioners misread *Rasul*. *Rasul* held that the "statutory predicate" for the Court's holding in *Eisentrager* had been overruled by *Braden*, and it therefore rejected the District of Columbia Circuit's broad holding, based on *Eisentrager*, that *statutory* habeas jurisdiction was unavailable to aliens at Guantanamo Bay. See *Rasul*, 542 U.S. at 475, 479. *Rasul* did not, however, cast any doubt on *Eisentrager*'s constitutional holding—or the holdings of subsequent cases relying on that holding—that aliens held abroad do not have a *constitutionally* guaranteed right to habeas corpus. See *id.* at 478. On the contrary, *Rasul* expressly reserved all constitutional questions. See *id.* at 485. Thus, nothing in *Rasul* suggests that the Court implicitly overruled *Eisentrager* or the many other precedents governing the territorial scope of constitutional rights.

trol" would overrule *Eisentrager*'s constitutional holding and extend the Suspension Clause worldwide. For security reasons alone, the United States would not detain captured combatants on any long-term basis at a facility that it did not control.

Indeed, a control or jurisdiction test is also in tension with the basic law of war requiring a captor to remove captured enemy combatants from the field of battle to a safe location away from the hostilities. That principle was recognized at the founding, cf. W. Winthrop, *Military Law and Precedents* 789 n.98 (2d ed. 1920) (Winthrop), and, at least with respect to prisoners of war, it has since been adopted by the Geneva Convention, see Geneva Convention Art. 19, 6 U.S.T. at 3334, 75 U.N.T.S. at 152 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.").

Moreover, making the application of the Suspension Clause turn on concepts of jurisdiction or control would involve the courts in sensitive foreign-affairs questions by requiring them to determine the level of *de facto* control exercised by the United States in the areas of foreign countries where detainees might be held. During wartime, the extent of control would vary over time and implicate a variety of sensitive foreign policy and military considerations. At other times, judicial determinations about the degree of United States control could complicate diplomatic relationships. Sovereignty, by contrast, offers an administrable bright-line rule that not only is deeply entrenched in this Court's existing precedent but, as explained next, is firmly grounded in the history of habeas corpus.

B. The Suspension Clause Does Not Entitle Petitioners To Any Additional Process Because Habeas Corpus Would Not Have Been Available To Them In 1789

Even assuming that petitioners may invoke any rights under the Suspension Clause, the MCA is consistent with the Suspension Clause because, at common law, the writ of habeas corpus would not have extended to alien enemy combatants detained at Guantanamo Bay. As the court of appeals recognized, the Suspension Clause protects the writ "as it existed in 1789." Pet. App. 10a (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)).[5] And in 1789, habeas corpus would not have been available to petitioners, for two independent reasons. First, the common-law writ was unavailable outside the sovereign territory of the Crown, and Guantanamo Bay is not sovereign United States territory. See *Eisentrager*, 339 U.S. at 768 ("We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of

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[5] Petitioners rely (Br. 15 n.14) on *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996), in which the Court "assume[d]," but did not decide, that the Suspension Clause "refers to the writ as it exists today, rather than as it existed in 1789." In their view, "post-1789 development[s]" have given them a right to the issuance of the writ. They identify no such developments, for none have occurred: there is no historical practice, either before or after 1789, of extending habeas to aliens detained as enemy combatants outside of sovereign territory. Petitioners also note (*ibid.*) that the framers were aware of the British prohibition on the practice of offshore detention. That may be true, but the practice has no relevance here, since it involved removing citizens from the country, not detaining aliens who had never even entered the country. See 4 William Blackstone, *Commentaries* *116 (noting that the 1679 Habeas Corpus Act, 31 Car. 2, ch.2, made it unlawful to "send any subject of this realm a prisoner into parts beyond the seas"); see also p. 30, *infra*.

his captivity, has been within its territorial jurisdiction."). Second, the common-law writ was simply not available to aliens detained as enemy combatants.

1. At common law, the writ of habeas corpus was not available outside the sovereign territories of the Crown

At common law, the writ of habeas corpus ran throughout the "dominion[s] of the Crown of England." *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759); see 3 William Blackstone, *Commentaries* *131 (Blackstone) (describing habeas as "running into all parts of the king's dominions"); accord 9 W.S. Holdsworth, *A History of English Law* 124 (1926). The Crown's dominions, in turn, consisted of territories under the Crown's sovereignty, such as England, Wales, and Ireland; the town of Berwick; the islands of Jersey, Guernsey, and Man; and the North American colonies. Although many of those territories exercised substantial legal autonomy from England and thus formed no part of its "kingdom," 1 Blackstone *93, or its "realm," *Cowle*, 97 Eng. Rep. at 598, all were sovereign territories of the Crown. See *Sir Matthew Hale's the Prerogatives of the King* 19 (D.E.C. Yale ed., 1976) (Hale) (defining "dominions" as consisting of territories "such as the king hath in right of the crown of England as parcel thereof *or annexed thereto*" and naming the territories listed above) (emphasis added); 1 Blackstone *94-105 (listing only sovereign territories in describing the Crown's "dominions").[9]

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[9] Hale also describes a second type of "dominions": territories held by the king personally rather than in his capacity as monarch of England. See Hale 19. Scotland fell into this category; its king, James VI, succeeded to the English throne in 1603 as James I. In *Cowle*, Lord Mansfield labels such territories "foreign dominions, which belong to a

Accordingly, when delineating the reach of habeas in *Cowle*, Lord Mansfield listed only sovereign territories of the Crown:[10] "We cannot send a habeas corpus to Scotland or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Dutchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty." *Cowle*, 97 Eng. Rep. at 600 (footnote omitted).[11] See 2 R. Chambers, *A Course of Lectures on the English Law Delivered at the University of Oxford, 1767-1773*, at 8 (Thomas M. Curley ed., 1986) ("[A] *habeas corpus ad subjiciendum* might always by common law, and may now by the express words of the Habeas Corpus Act, be directed to any county palatine, the Cinque Ports or any

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prince who succeeds to the throne of England," and makes clear that as to those dominions "this Court has no power to send any writ of any kind." *Cowle*, 97 Eng. Rep. at 599-600. See 1 Blackstone *106 (describing "foreign dominions which may belong to the person of the king by hereditary descent, by purchase, or other acquisition," such as Hanover, as "entirely unconnected with the laws of England").

[10] The island of Minorca, to which Lord Mansfield says the court had "the power" to send the writ but did not do so in practice, *Cowle*, 97 Eng. Rep. at 600, was also a sovereign territory of the Crown. It was conquered from Spain in 1708, and Spain recognized the British claim in the 1713 Treaty of Utrecht. 2 *Historical Dictionary of the British Empire* 749 (J. Olson & R. Shadle eds., 1996).

[11] Petitioners misread *Cowle*'s statement, immediately preceding the text just quoted above, that "[t]here is no doubt as to the power of this Court [to issue habeas]; where the place is under the subjection of the Crown of England." *Cowle*, 97 Eng. Rep. at 599; Br. 11. Once that phrase is placed into context with the passage quoted above, which lists *only* sovereign territories of the Crown, it is clear that by "subjection" Lord Mansfield meant territorial sovereignty, not mere control.

other privileged place within the kingdom of England, as well as to Wales, Berwick, or the Isles of Jersey and Guernsey."). The writ did indeed have an "extraordinary territorial ambit," *Rasul*, 542 U.S. at 482 n.12 (quoting R. Sharpe, *The Law of Habeas Corpus* 188-189 (2d ed. 1989) (Sharpe))—at the time, the sun virtually did not set on Britain's empire—but its reach was not unlimited. And the line describing its reach was drawn at formal sovereignty, not at *de facto* control.

That conclusion is confirmed by the Habeas Corpus Act, 1679, 31 Car. 2, ch. 2 (Eng.) (1679 Act), enacted in response to abuses by the Earl of Clarendon, who was impeached for sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." *Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and Other High Crimes and Misdemeanors: 15 and 19 Charles II. A.D. 1663-1667, in* 6 *Cobbett's Complete Collection of State Trials* 291, 330 (T.B. Howell ed., 1816). The 1679 Act integrated two originally separate pieces of legislation that were directed at two distinct problems presented by the Clarendon affair.

The first piece of legislation was intended to reinforce the reach of the common-law writ and end a variety of abuses that had made the writ ineffective. Thus, among other things, the Act confirmed that "an *habeas corpus* * * * may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, and the islands of *Jersey* or *Guernsey*; any law or usage to the contrary notwithstanding." 1679 Act § 11. All of those places were sovereign territories of the Crown (even if outside the king-

dom or realm of England). See H. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 529-530 (1960); 2 H. Hallam, *The Constitutional History of England* 232-233 (photo. reprint 1989) (5th ed. 1846).

The second piece of legislation was directed at the problem of the transportation of prisoners beyond the reach of habeas. After all, merely confirming the writ's scope was insufficient if one within the territory of the Crown could be sent to territories where "no *Habeas Corpus* can reach him." W. Duker, *A Constitutional History of Habeas Corpus* 53 (1980) (quoting T. Lee *in* 1 A. Grey, *Debates of the House of Commons* 237 (1763)). Thus the Act provided that "no subject of this realm" who is "an inhabitant or resident of this kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, shall or may be sent prisoner into *Scotland, Ireland, Jersey, Guernsey, Tangier*, or into parts, garrison islands or places beyond the seas, which are or at any time hereafter shall be *within or without the dominions of his Majesty*." 1679 Act § 12 (last emphasis added). That list of places included territories within the Crown's dominions where practical difficulties made it impossible to issue the writ. See *Cowle*, 97 Eng. Rep. at 599-600. Significantly, the list also included territories *outside* the Crown's dominions where the writ simply did not run (*e.g.*, Scotland, see *id.* at 600). The latter category would have included places under the Crown's control but not its sovereign authority.

Petitioners and their many *amici* offer not a single example of common law habeas reaching territories outside the Crown's sovereignty. They make much of the Indian cases (Br. 12; Al Odah Br. 14), but the Indian courts were set up by a charter that explicitly granted

"the like jurisdiction and authority as may be executed by the chief justice and other justices of the court of King's Bench in *England*." *Charter for Erecting a Supreme Court of Judicature at Fort William, in Bengal, Dated 26th March, 1774, in A Collection of Statutes Concerning the Incorporation, Trade, and Commerce of the East India Company* xlv App. (F. Russell ed., 1794); *id.* at l. The Supreme Court of Judicature at Calcutta explicitly drew upon that statutory grant of power in issuing writs of habeas corpus. See *Rex* v. *Mitter*, 1 Indian Dec. (O.S.) 1008 (Calcutta S.C. 1781). Notably, because the statute only granted to the court "the powers of Justices of the * * * King's Bench" and *not* "the general powers of the * * * King's Bench," the Court at Calcutta concluded that while its justices *severally* had the power to issue habeas, it "has not authority to issue the writ" as a court. *Ibid.* *Mitter* demonstrates that the Indian courts would not have had authority to grant the writ in the absence of the statutory grant of power; nor is there any evidence that habeas ran from England to India.

Two cases from the first half of the twentieth century underscore that habeas was limited to the Crown's sovereign territories. In *Rex* v. *Earl of Crewe* [1910] 2 K.B. 576, 622-623 (Eng.) (*Crewe*), Lord Justice Kennedy reasoned that habeas did not run to the Bechuanaland Protectorate (now Botswana) because it was not part of the King's dominions. "'His Majesty's dominions' means regions over and in which His Majesty has and exercises the whole collection or bundle of separable powers * * * which constitute territorial sovereignty." *Id.* at 622. Even though the chiefs of local tribes in Beuchuanaland had "abandoned all rights and jurisdiction" over the land to Britain, the King had "never annexed"

it "to the possessions of the British Crown"; consequently, it "cannot properly be treated as part of [the King's] dominions." *Id.* at 623.

Similarly, *In re Ning Yi-Ching*, 56 T.L.R. 3 (Vacation Ct. 1939) (Eng.), held that habeas did not run to Tientsin, where four Chinese subjects were detained in the British Concession. The court ruled that Tientsin, over which Britain had "acquired a lease of land and had been granted by treaty the right to administer justice to its own subjects," *id.* at 6, was "part of a foreign country within which the King had certain jurisdiction," but had "never been acquired by settlement or otherwise" and thus was not part of the King's dominions. *Id.* at 5.[12]

Petitioners assert (Br. 11) that *Rasul* resolved the availability of the common-law writ outside the sovereign territory of the Crown. That is incorrect. The only question considered in *Rasul* was the scope of the habeas statute, see 542 U.S. at 475, and the Court answered that question by concluding that Guantanamo Bay detainees "are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481. Only after reaching that conclusion—and answering the question presented—did the Court offer the observation that its interpretation of the statute was "consistent with the his-

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[12] Petitioners rely (Br. 11) upon *In re Mwenya*, [1960] 1 Q.B. 241 (Eng.), for the proposition that the reach of habeas did not depend upon territorial sovereignty. But that case dates from 1960—even later than *Cruce* and *Ning Yi-Ching*—and, standing alone, is hardly a reliable guide to English practice 171 years earlier. In addition, the opinions in *Mwenya* repeatedly stressed the petitioner's status as a British subject, *id.* at 300, 302 (Lord Evershed); *id.* at 304, 306 (Romer, L.J.); *id.* at 307, 311 (Sellers, L.J.), and the court's willingness to stretch the writ's traditional territorial limitations could be explained on that ground.

torical reach of the writ." *Ibid.* That discussion was therefore not necessary to the Court's holding.

In discussing the history of habeas corpus, *Rasul* stated that, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-482 (footnotes omitted). That statement is correct, since the "exempt jurisdictions" and the "other dominions" cited were all sovereign territories of the Crown. The Court did not cite any case demonstrating that the 1789 writ would have extended to territories where Britain was *not* sovereign.[13] See *id.* at 502-505 (Scalia, J., dissenting). Moreover, the cases cited by the Court involved British subjects and therefore did not consider the application of the writ to foreign nationals. See *id.* at 503-504; note 12, *supra*. In any event, because it was addressed to the statutory question that the Court resolved in *Rasul*, the Court's brief historical discussion does not control the constitutional issue presented here and therefore does not foreclose a proper understanding of the historical backdrop against which the Suspension Clause was enacted.

2. *The United States does not exercise sovereignty over Guantanamo Bay, Cuba*

It is beyond dispute that Cuba, not the United States, possesses sovereignty over Guantanamo Bay. See *Rasul*, 542 U.S. at 475 (the United States lacks "ul-

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[13] The Court did cite *Mwenya*, see *Rasul*, 542 U.S. at 482 & n.14, but as explained above, see note 12, *supra*, that case is not evidence of the territorial scope of the writ in 1789.

timate sovereignty" over Guantanamo Bay). The United States operates the naval base at Guantanamo Bay only under the terms of written agreements between it and Cuba. Under those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418 (Lease).[14]

This Court has held that provisions such as these do not effect a transfer of sovereignty. For example, in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948) (*Vermilya-Brown*), the Supreme Court concluded that a leased military base in Bermuda, over which the United States had "substantially the same" rights as it has over the base in Guantanamo Bay, *id.* at 383, was "beyond the limits of national sovereignty." *Id.* at 390. Though the Court held the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, applicable to the base, it did

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[14] See Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (Supp. Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682 (Treaty). The United States is also restricted in how it can use Guantanamo Bay: it may "fit the premises for use as coaling or naval stations only, and for no other purpose." Lease Art. II. Thus, it may not allow civilian settlement at Guantanamo Bay, or establish "commercial" or "industrial" enterprises there, Supp. Lease Art. III, or allow the land to remain idle, see Lease Art. I; Treaty Art. III, 48 Stat. 1683. In addition, the United States lacks the right to exclude vessels "engaged in the Cuban trade" from the waters of the bay. Lease Art. II. The United States does not have the authority to establish a territorial government in Guantanamo Bay, make Guantanamo Bay a State, offer it independence, sell it, or cede it to a third country. Such restrictions are incompatible with the exercise of sovereignty.

so only after discerning a specific congressional intent to apply the statute "on foreign territory." See *Vermilya-Brown*, 335 U.S. at 390. Similarly, in *United States* v. *Spelar*, 338 U.S. 217 (1949), the Supreme Court held that the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(k), applied to a U.S. military base in Newfoundland because the governing lease had "effected no transfer of sovereignty." *Spear*, 338 U.S. at 221-222. The lease terms were "the same" as the ones at issue in *Vermilya-Brown*. See *id.* at 218.

Nothing in *Rasul* upsets those settled principles. In *Rasul*, the Court addressed only the question whether the then-existing habeas statute applied to Guantanamo Bay. See 542 U.S. at 475. In answering that statutory question, the Court considered the extent of the "jurisdiction and control" that the United States exercises there. *Id.* at 480 (quoting Lease Art. III); see *id.* at 487 (Kennedy, J., concurring in the judgment). But as explained above, whatever relevance those concepts have for judging the scope of the habeas *statute*, "jurisdiction and control" did not define the reach of the common law writ. At common law, formal sovereignty was the touchstone, and the King, not the courts, decided whether to extend formal sovereignty to territory over which Britain exercised jurisdiction and control. See *Crewe*, [1910] 2 K.B. at 623 (opinion of Kennedy, L.J.) ("I never heard that you can force a Sovereign to take territory.").

Our own law is in accord with that common-law tradition. As this Court has explained, the "determination of sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380; see *Jones* v. *United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question."); *Rose* v.

Himely, 8 U.S. (4 Cranch) 241, 272 (1808) (Marshall, C.J.) ("It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting."), overruled in part on other grounds by *Hudson* v. *Guestier*, 10 U.S. (6 Cranch) 281 (1810). If courts were to second-guess the political branches regarding who is sovereign over a particular foreign territory, they would not only undermine the President's "lead role * * * in foreign policy," *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972), but also "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000); see *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003).

Here, both political branches have recognized Cuba's ultimate sovereignty over Guantanamo Bay. See Lease Art. III; cf. DTA § 1005(g), 119 Stat. 2743 ("the term 'United States' * * * does not include the United States Naval Station, Guantanamo Bay, Cuba"); *Customs Duties—Goods Brought into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536, 539 (1929) (Guantanamo Bay is not a "possession" of the United States). The court of appeals was correct in concluding that the United States does not possess sovereignty over Guantanamo Bay, and that the common law writ of habeas corpus would therefore have been unavailable to aliens detained there. Pet. App. 10a-14a.

3. At common law, the writ of habeas corpus was not available to aliens detained as enemy combatants

In 1789, habeas corpus would have been unavailable to petitioners for an independent reason: the common-law writ did not extend to aliens detained as prisoners of war. "One generally understands by a prisoner of war a person captured during the warlike operations by the naval or military forces of the Crown." *The King* v. *Superintendent of Vine St. Police Station*, [1916] 1 K.B. 268, 274 (Eng.) (*Vine St.*). Petitioners are not "prisoners of war" within the meaning of the Geneva Convention because, among other reasons, al Qaeda is not a party to the Convention, and neither al Qaeda nor the Taliban satisfies the requirements of Article 4(A)(2) of the Convention, such as having a fixed distinctive sign and "conducting their operations in accordance with the laws and customs of war." Art. 4(A)(2)(b) and (d), 6 U.S.T. at 3320, 75 U.N.T.S. at 138. Nevertheless, as confirmed enemy combatants they fall within the common-law understanding of "prisoners of war" as to whom habeas was traditionally unavailable. Indeed, given the greater protections available to prisoners of war, the historic unavailability of habeas to vindicate those protections would apply *a fortiori* to enemy spies and unlawful combatants who did not qualify as prisoners of war. Cf. *Quirin*, 317 U.S. at 31 (spies and "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war").

At common law, prisoners of war did not have to be captured on the battlefield; "real danger to the realm may * * * exist * * * at distances far from where the

actual clash of arms is taking place." *Vine St.*, [1916] 1 K.B. at 278. Nor did it matter where the prisoner was held; even those detained in England had no right to habeas. The "Rights of Prisoners taken in War" were determined by the "Judicial Power" of military officers, not by the civilian courts. M. Hale, *The History of the Common Law of England* 39 (1713).

Thus, in the *Case of Three Spanish Sailors*, 96 Eng. Rep. 775, 775 (C.P. 1779), the court held that habeas corpus did not lie for sailors "taken as prisoners of war on board of a Spanish privateer" and subsequently transported to England. *Ibid.* The court concluded, "[A]lien enemies and prisoners of war * * * [are] not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776.

Similarly, in *Rex* v. *Schiever*, 97 Eng. Rep. 551, 551 (K.B. 1759), the court denied the writ to the "subject of a neutral power, taken on board of an enemy's ship" and transported to Liverpool, even though the Swedish petitioner claimed to have been detained against his will on the French vessel and to have had no hostility to England. The mere fact that he had been on board the French ship was enough for the court to conclude that the petitioner was, "upon his own shewing, clearly a prisoner of war, and lawfully detained as such." *Id.* at 552. See *Furly* v. *Newnham*, 99 Eng. Rep. 269, 269 (K.B. 1780) ("there could be no habeas corpus [ad testificandum] to bring up a prisoner of war").

Prisoners of war lacked an entitlement to habeas because "the Crown in making a man a prisoner of war is acting under the royal prerogative (under which it wages war) and * * * its act, like certain other acts as a belligerent, is not examinable by the Courts." Lord McNair & A.D. Watts, *The Legal Effects of War* 95

(1966). Accordingly, when presented with a petition from a prisoner of war, "a complete answer to the writ will be that the applicant is both in fact and in law a prisoner of war detained by authority of the Crown." Sharpe 116. Thus, in *Schiever*, the court looked no further than the fact that the petitioner had been found aboard an enemy ship. His status as a subject of a neutral power, and his protestations that he had been forced to serve against his will, did not alter his status as a prisoner of war. See 97 Eng. Rep. at 551-552.

Petitioners rely (Br. 12 n.7) on *Lockington's Case*, Brightly 269 (Pa. 1813), and *United States* v. *Williams* (C.C. Va. Dec. 4, 1813), *discussed in* G. Neuman & C. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d 39, 41, 44-45 (2005) (Neuman & Hobson), for the proposition that courts reached the merits when faced with habeas petitions by alien enemies.[15] But neither case dealt with prisoners of war seized abroad and determined by the military to be combatants. Rather, both cases involved British citizens who had long resided

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[15] "In the primary meaning of the words, * * * an alien enemy is the subject of a foreign state at war with the United States." *Eisentrager*, 339 U.S. at 769 n.2 (quoting *Techt* v. *Hughes*, 128 N.E. 185, 186 (N.Y. 1920) (Cardozo, J.)). However, the category also includes citizens of neutral countries who have engaged in or supported hostilities against this country or associated with those who have. See *Vaughan's Case*, 91 Eng. Rep. 535, 536 (K.B. 1696) ("If * * * certain Dutchmen * * * fight under command of the French King, they are *inimici* to us, and *Gallici subditi*; for the French subjection makes them French subjects in respect of all other nations but their own."); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 311 (1871) ("[T]hose must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war.").

in the United States and who became enemy aliens solely by operation of law during the war of 1812. See Neuman & Hobson 44-45. Indeed, the court in *Lockington's Case* was emphatic that habeas was *not* available to prisoners of war, even those detained in the United States: "[A] prisoner of war * * * is not entitled to a privilege which never could have been intended for persons of that description. A prisoner of war is subject to the laws of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country." Brightly at 276 (Tilghman, C.J.); see *id.* at 289 (Yeates, J.) ("I do not view [petitioner] as a prisoner of war, subdued and forcibly brought into the United States.").

C. The DTA Is An Adequate Substitute For Habeas Corpus

Finally, even in contexts to which the Suspension Clause is fully applicable, this Court has held that Congress may withdraw habeas jurisdiction if it provides an "adequate and effective" alternative remedy. *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *St. Cyr*, 533 U.S. at 314 n.38 ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals."); see *United States* v. *Hayman*, 342 U.S. 205, 223 (1952); cf. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of the writ are 'normally for Congress to make.'") (quoting *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996)). Importantly, the yardstick for judging the adequacy of the DTA alternative would be the limited and deferential role of habeas in the context of wartime detentions. DTA review is a fully adequate substitute for habeas corpus in this extraordinary wartime context. Thus, even if petitioners could assert rights under the Suspen-

sion Clause, and even if habeas would traditionally have been available to enemy combatants held overseas, the MCA would not violate those rights. Although the court of appeals had no occasion to reach that issue, it constitutes an alternative ground for affirming the judgment.

1. At a minimum, petitioners should be required to exhaust their DTA remedies before challenging the constitutionality of the MCA

As an initial matter, if this Court determines that petitioners have Suspension Clause rights and that habeas would have been available to them at common law, it should decline to rule on the adequacy of the DTA at this time, but should instead require petitioners to exhaust their available DTA remedies. Because petitioners have not exhausted their remedies under the DTA, the exact nature of DTA review remains uncertain. This Court should not attempt to evaluate the adequacy of the DTA until the District of Columbia Circuit has had an opportunity to construe the statute and this Court can examine its operation in a concrete setting. Indeed, important questions remain subject to consideration or elaboration as to the scope of the review available under the DTA and will be fleshed out on a case-by-case basis. See, *e.g.*, *Bismullah* v. *Gates*, No. 06-1197, 2007 WL 2067938 (D.C. Cir. July 20, 2007).[16]

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[16] In *Bismullah*, the court of appeals held that the record on review includes—and the government is obligated to produce—"all the information the [CSRT] is authorized to obtain and consider," whether or not the CSRT actually obtained or considered it in making its decision. 2007 WL 2067938, at *1. The government has filed a petition for rehearing. See Pet. Reh'gs, *Bismullah*, *supra* (D.C. Cir. filed Sept. 7, 2007). On October 3, 2007, the court of appeals panel denied rehearing,

The settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted. See *Rose* v. *Lundy*, 455 U.S. 509, 515-516 (1982). This requirement is most commonly applied in cases where the available remedies are in state-court proceedings, see 28 U.S.C. 2254(b)(1), but it also applies to federal proceedings, see, *e.g.*, *Hayman*, 342 U.S. at 223, including those conducted by military tribunals, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 537 n.11 (1999); *Noyd* v. *Bond*, 395 U.S. 683, 693-699 (1969); cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). The comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war. See *Hamdi*, 542 U.S. at 531 (plurality opinion); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) ("[T]here is a realm of political authority over military affairs where the judicial power may not enter.").

To be sure, in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), this Court declined to require exhaustion of the military-commission process before considering a challenge to the system of military commissions unilaterally established by the President. The Court emphasized that, while courts ordinarily "should respect the balance that Congress struck," *id.* at 2770, the military commissions were not established by Congress and did not provide for "independent review," *id.* at 2771. The contrast between this case and *Hamdan*, however, is striking.

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but issued a decision elaborating on its initial decision. See *Bismullah* v. *Gates*, No. 06-1197, 2007 WL 2851702. The government's petition for rehearing en banc remains pending.

Congress enacted the statute at issue here in direct response to *Hamdan*. Moreover, the DTA and the MCA expressly recognize and affirm the CSRT process. See DTA § 1005, 119 Stat. 2740; MCA § 3(a)(1), 120 Stat. 2603 (to be codified at 10 U.S.C. 948d(c) (2006)). Under the DTA and the MCA, petitioners will enjoy "independent review" of the CSRT determinations in the District of Columbia Circuit. Accordingly, this Court should now "respect the balance that Congress struck" and require petitioners to avail themselves of the statutory procedures created by Congress under the traditional rule that a habeas petitioner must first exhaust his remedies before permitting the detainees to challenge the scope of review in this Court. Especially when the pertinent question is the adequacy of a statutory alternative to habeas, it only makes sense to evaluate the question in light of the concrete application of the statute in a particular case.

2. The scope of any habeas review that would exist in these circumstances is very limited

If this Court does reach the merits of petitioners' Suspension Clause claim, the baseline for assessing the adequacy of the DTA must be the scope of the pre-existing habeas remedy. See *Pressley*, 430 U.S. at 381-382 (comparing the scope of the remedy provided with the scope of pre-existing habeas corpus remedy). In this case, the analysis must be made with reference to the historical procedures for identifying and detaining enemies during wartime, as well as with reference to the limited scope of traditional habeas review of military detentions during wartime (where habeas has applied).

a. As explained above, see pp. 37-40, *supra*, there is no history of providing any habeas review to aliens cap-

tured abroad during an armed conflict. Only in recent times have those captured on a foreign battlefield been afforded any process, and that process has been extremely limited and reflected by the procedures outlined in Article 5 of the Geneva Convention and Army Regulation 190-8, which provide, as do the CSRTs, for a military tribunal to determine the status of a detainee. See Army Reg. 190-8, paras. 1-6(e)(3) and (5). Those military procedures call for only a circumscribed review of an individual's status and do not include any mechanism for judicial review.

Even in cases where this Court has used habeas to review *criminal* judgments of military tribunals, the scope of that review has been extraordinarily limited. This Court has held that the habeas review afforded in that context does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military tribunal had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946) ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners."); *id.* at 23 ("[T]he commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts."); *Quirin*, 317 U.S. at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners."); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J., dissenting) (extent of habeas review "is of most limited scope"); cf. *Hamdi*, 542 U.S. at 535 (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting"). See generally *Hiatt* v. *Brown*, 339 U.S. 103, 111 (1950) ("It is well settled

that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court martial.'") (quoting *In re Grimley*, 137 U.S. 147, 150 (1890)); *Burns* v. *Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."). So long as the tribunals have "lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts." *Yamashita*, 327 U.S. at 8.

The type of review available under *Yamashita* and *Quirin*—a level of review deemed adequate for an alien enemy within sovereign United States territory who has been convicted by a military commission and sentenced to death—provides the most plausible yardstick for assessing whether the review provided under the DTA affords an adequate and effective substitute remedy for any applicable habeas right. See *Pressley*, 430 U.S. at 381. Petitioners are being detained for non-punitive reasons during the ongoing conflict. See *Hamdi*, 542 U.S. at 518-524 (plurality opinion). Their right to judicial review can certainly be no greater than that traditionally provided to those held for punishment—including death—pursuant to the judgment of a military tribunal.

While this case involves aliens captured and detained outside the United States with no constitutional habeas rights, it is notable that, even as to a United States citizen held as an enemy combatant within the United States, the right of habeas review is highly circumscribed and requires deference to any military tribunal. The plurality in *Hamdi* held that while the citizen petitioner had due process rights (in contrast to petitioners

here), those rights could be satisfied by a straightforward and rudimentary procedure fashioned for wartime detention: "notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. Within that general framework, the proceedings "may be tailored to alleviate their uncommon potential to burden the Executive." *Ibid.* To that end, "[h]earsay * * * may * * * be accepted," and there may be "a presumption in favor of the Government's evidence." *Id.* at 533-534. And in reviewing the "administrative record developed after" such a proceeding, courts may employ the "'some evidence' * * * standard of review." *Id.* at 537.

The plurality explained that the requirements of due process "could be met by an appropriately authorized and properly constituted military tribunal." *Hamdi*, 542 U.S. at 538. Indeed, the plurality observed, citing Army Reg. 190-8, that "military regulations *already provide for such process* in related instances." *Ibid.* (emphasis added). And even when there was *no* formal administrative factfinding process, *Hamdi* expressly rejected "extensive discovery of various military affairs" in a federal court. *Id.* at 528. Instead, the plurality stated that the "factfinding process [must be] both prudential and incremental." *Id.* at 539. Rather than allow discovery, the Court stated that a habeas petitioner should be allowed simply "to present his own factual case to rebut the Government's return." *Id.* at 538.

b. Petitioners assert (Br. 19-24) that habeas corpus traditionally provided a searching factual review. But with only two exceptions, none of the cases they cite involved the detention of aliens determined by the military to be enemy combatants. Those exceptions are *Schiever*

and the *Case of Three Spanish Sailors*, which petitioners contend (Br. 23) stand for the proposition that prisoners of war could "offer evidence supporting release." Cf. Legal Historians Amici Br. 6. Petitioners misread the cases. Although the courts discussed the factual allegations made by the detainees, they did not attempt to adjudicate the truth of those allegations. Instead, the basis for the decisions was that the detainees' claims were *legally* insufficient. See *Schiever*, 97 Eng. Rep. at 552 ("the Court thought this man, upon his own shewing, clearly a prisoner of war"); *Case of Three Spanish Sailors*, 96 Eng. Rep. at 776 ("these men, upon their own shewing, are alien enemies and prisoners of war"). The cases therefore do not establish that the detainees would have been entitled to an evidentiary hearing in habeas; indeed, they do not even establish that the courts had jurisdiction over claims by aliens held as prisoners of war. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (explaining that "'drive-by jurisdictional rulings' * * * should be accorded 'no precedential effect'") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

c. Even outside of the military context, the scope of habeas review of Executive Branch detention decisions is limited. This Court has explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 305-306 (footnote omitted); cf. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("[H]abeas courts sit to ensure that individu-

als are not imprisoned in violation of the Constitution—not to correct errors of fact."); 28 U.S.C. 2254(e).[17]

3. The DTA remedy is adequate and effective

The remedy provided by the DTA and the MCA is neither "inadequate" nor "ineffective" to test the legality of petitioners' detention. *Pressley*, 430 U.S. at 381. Because petitioners challenge the DTA before they have exhausted its procedures, petitioners are in effect making a facial challenge to the validity of the DTA procedures. That challenge should accordingly be analyzed under the searching standard typically reserved for facial challenges, giving every benefit of the doubt to the validity of those procedures in actual cases.

The Defense Department established the CSRT procedures using as a baseline the procedures described by the *Hamdi* plurality—procedures the plurality deemed adequate under the Due Process Clause and described as "already" existing in Army Regulation 190-8. 542 U.S. at 538. Under *Hamdi*, it is sufficient for military

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[17] For example, in the immigration context, this Court has historically approved a very limited scope of habeas review. See *St. Cyr*, 533 U.S. at 314 n.38 (recognizing that "the scope of review on habeas is considerably more limited than on APA-style review"). Until the enactment of the Immigration and Nationality Act, 8 U.S.C. 1001 *et seq.*, in 1952, the sole means by which an alien could test the legality of his or her deportation order was through a habeas corpus action. See, *e.g.*, *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888); *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). "In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive. However, they did review the Executive's legal determinations." *St. Cyr*, 533 U.S. at 306 (footnote and citation omitted); see *Ekiu* v. *United States*, 142 U.S. 651, 663 (1892) (review was limited to the question whether the immigration inspector was "acting within the jurisdiction conferred upon him").

enemy combatant determinations to provide a citizen with "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533. Thereafter, judicial review of the military determination may use the "some evidence" standard of review. *Id.* at 537. The CSRT process, followed by DTA review in the District of Columbia Circuit, more than satisfies these requirements.

a. The CSRT procedures afford *notice*: the recorder of a tribunal "shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." 06-1196 Pet. App. 143; see *Hamdi*, 542 U.S. at 533 (plurality opinion).[18]

The CSRT procedures also afford an *opportunity to rebut* the Government's case: the detainee has a "right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence," 06-1196 Pet. App. 144; the detainee "shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," *ibid.*; and the detainee "shall be allowed to attend all proceedings," except as to "matters that would compromise national security if held in the presence of the detainee," 06-1196 Pet. App. 143; see *Hamdi*, 542 U.S. at 534 (plurality opinion).

Finally, the CSRT procedures afford a *neutral decisionmaker*: each CSRT is composed of three military officers, "none of whom was involved in the apprehen-

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[18] Although the CSRT procedures do not allow the detainee to review classified information, neither does Army Regulation 190-8. Compare Army Reg. 190-8, paras. 1-6(e)(3) and (5), with 06-1196 Pet. App. 143, 155.

sion, detention, interrogation, or previous determination of status of the detainee." 06-1196 Pet. App. 142; see *Hamdi*, 542 U.S. at 533 (plurality opinion).

The CSRT procedures provide detainees a process similar to that called for by Article 5 of the Geneva Convention, as implemented by Army Regulation 190-8. The CSRT and Army Regulation 190-8 procedures have the following features in common, among others:

- Tribunals are composed of three commissioned officers plus a non-voting officer who serves as recorder;[19]

- Tribunal members are sworn to faithfully and impartially execute their duties;[20]

- The detainee has the right to attend the open portions of the proceedings;[21]

- An interpreter is provided if necessary;[22]

- The detainee has the right to call relevant witnesses if reasonably available, question witnesses called by the tribunal, and testify or otherwise address the tribunal;[23]

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[19] Compare Army Reg. 190-8, para. 1-6(c), with 06-1196 Pet. App. 142.

[20] Compare Army Reg. 190-8, para. 1-6(e)(1), with 06-1196 Pet. App. 143.

[21] Compare Army Reg. 190-8, para. 1-6(e)(5), with 06-1196 Pet. App. 143.

[22] Compare Army Reg. 190-8, para. 1-6(e)(5), with 06-1196 Pet. App. 143.

[23] Compare Army Reg. 190-8, para. 1-6(e)(6), with 06-1196 Pet. App. 144.

- The detainee may not be forced to testify;[24]
- The tribunals make decisions by majority vote;[25]
- The decision is made based on a preponderance of the evidence;[26]
- The tribunals create a written report of their decision;[27] and
- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.[28]

The CSRT procedures are more detailed than Army Regulation 190-8 and, in several respects, provide greater procedural protections than those required for Article 5 Tribunals. For example:

- The CSRTs contain express qualifications to ensure the tribunal's independence. See 06-1196 Pet. App. 150-151. There are no comparable qualifications for Article 5 Tribunals.
- The CSRTs provide the detainee a personal representative to assist him in preparing his case. See

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[24] Compare Army Reg. 190-8, para. 1-6(e)(8), with 06-1196 Pet. App. 144.

[25] Compare Army Reg. 190-8, para. 1-6(e)(9), with 06-1196 Pet. App. 144.

[26] Compare Army Reg. 190-8, para. 1-6(e)(9), with 06-1196 Pet. App. 144.

[27] Compare Army Reg. 190-8, para. 1-6(e)(10), with 06-1196 Pet. App. 163.

[28] Compare Army Reg. 190-8, para. 1-6(g), with 06-1196 Pet. App. 163-164.

06-1196 Pet. App. 168-172. There is no such requirement in Article 5 Tribunals.

• In CSRTs, the Recorder is obligated to provide to the Tribunal "evidence to suggest that the detainee should *not* be designated as an enemy combatant." See 06-1196 Pet. App. 165 (emphasis added). There is no such requirement in Article 5 Tribunals.

• In CSRTs, the detainee is provided with an unclassified summary of the evidence supporting his detention in advance of the hearing. See 06-1196 Pet. App. 143. There is no such requirement in Article 5 Tribunals.

• CSRTs allow the detainee to introduce relevant documentary evidence. *See* 06-1196 Pet. App. 155. Article 5 Tribunals provide no analogous guarantee.

• Every CSRT decision is automatically reviewed by a higher authority, who may return the record to the tribunal for further proceedings. See 06-1196 Pet. App. 164. There is no counterpart provision for Article 5 Tribunals.

Under the plurality opinion in *Hamdi*, these procedural protections are more than sufficient for a military determination that an American citizen in this country may be held as an enemy combatant. *A fortiori*, they are sufficient for alien enemy combatants captured and detained outside the United States.

b. Likewise, the DTA's judicial review mechanisms more than satisfy the *Hamdi* plurality's statement of the appropriate scope of review of military enemy-combatant determinations. See *Hamdi*, 542 U.S. at 537-538 (plurality opinion). Section 1005(e)(2)(C) of the DTA

specifies the District of Columbia Circuit's "[s]cope of review" of the CSRT's enemy-combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." § 1005(e)(2)(C)(i), 119 Stat. 2742. In addition, the court must decide, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C)(ii), 119 Stat. 2742. The judgment of the District of Columbia Circuit, in turn, is reviewable in this Court. See 28 U.S.C. 1254(1). Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

4. Petitioners' objections to the CSRT process lack merit

Petitioners identify various perceived deficiencies in the CSRT procedures. Even if petitioners were correct, their arguments would not establish that *DTA review* is inadequate. Under the DTA, the District of Columbia Circuit must decide, "to the extent the Constitution and laws of the United States are applicable, whether the * * * [CSRT] standards and procedures * * * [are] consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. Petitioners can therefore present their arguments to the

District of Columbia Circuit, and if the arguments are meritorious, the District of Columbia Circuit will provide relief. The relief available there would necessarily ensure that the combined effect of the CSRTs and the DTA satisfy the Suspension Clause (to the extent it is applicable). That provides a complete answer to petitioners' objections to the CSRT process. In any event, petitioners' criticisms of the CSRT process are not only premature but also without merit.

a. Petitioners complain (Br. 31-32; Al Odah Br. 35) that CSRTs do not permit them to be represented by counsel. They present no evidence that aliens captured on a foreign battlefield and held as enemy combatants have *ever* been given hearings regarding their enemy combatant status at which they were represented by counsel. To the contrary, the procedures set forth in Army Regulation 190-8—which the *Hamdi* plurality thought sufficient even for citizens detained as enemy combatants—provide no right to counsel.[20] Indeed, even when the criminal punishment of American citizens is at issue, there is generally no right to counsel in administrative proceedings like the CSRTs. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974) (prison disciplinary hearing); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 787 (1973) (parole revocation hearing).

Petitioners' alleged right to administrative counsel is even more implausible because the CSRTs afford each detainee a personal representative. That individual is a "military officer, with the appropriate security clear-

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[20] Although the Geneva Convention provides right to counsel when a prisoner of war is subjected to a criminal trial, see Geneva Convention, Art. 99, 6 U.S.T. at 3392, 75 U.N.T.S. at 210; *id.* Art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214, it provides no right to counsel in an Article 5 tribunal to determine a detainee's status.

ance" assigned to the detainee "for the purpose of assisting the detainee" in the CSRT process. 06-1196 Pet. App. 141. The personal representative may attend the entire CSRT proceeding, even where classified information is at issue. *Id.* at 143. The personal representative fulfills some of the most important functions of counsel: he is required to "explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal." *Id.* at 168. Finally, the personal representative may "comment upon classified information" that bears upon the detainee's status. *Id.* at 170.

b. Petitioners also object (Al Odah Br. 33-34; El-Banna Br. 33-38) that they were not given access to classified information that, in most cases, formed part of the basis for the government's determination that they were enemy combatants. In effect, petitioners contend that the armed forces cannot legally capture al Qaeda terrorists on a foreign battlefield, and then detain them abroad as enemy combatants, without giving them access to classified information about our sources and methods of intelligence against al Qaeda. Petitioners cite no authority for that startling proposition, which is inconsistent with the conduct of every armed conflict in this country's history; inconsistent with Army Regulation 190-8, which specifically permits a tribunal to hold proceedings closed to the detainee; and inconsistent with *Hamdi*, which recognized that, even where the liberty of a citizen is at issue, the danger that "discovery into military operations" might "intrude on the sensitive secrets of national defense" is a consideration "properly taken

into account in our due process analysis." 542 U.S. at 532 (plurality opinion).

c. Further, petitioners claim (Br. 27-29; Al Odah Br. 33) that the CSRT procedures precluded them from submitting rebuttal evidence. That contention ignores the provisions of those procedures that allow the detainee to testify, to seek the testimony of reasonably available witnesses, and to seek and obtain other reasonably available evidence. 06-1196 Pet. App. 144. Detainees are also free to present claims in their DTA proceedings that any particular exclusion of evidence was inconsistent with the CSRT's standards and procedures or with applicable law. See DTA § 1005(e)(2)(C), 119 Stat. 2742.

More importantly, petitioners' claim (Al Odah Br. 35) that DTA counsel is precluded from "supplement[ing] the record" fails to account for the fact that counsel in cases brought on behalf of detainees have actively participated in submitting material for review by the Department of Defense in considering whether to reopen CSRT proceedings.[30] In one recent case, a new CSRT was ordered in response to counsel's submission of new evidence bearing on a detainee's status. See Respondent's Motion to Remand, *Al Ginco* v. *Gates*, No. 07-1090 (D.C. Cir. filed Sept. 13, 2007).

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[30] Under instructions issued by the Department of Defense Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), upon the receipt of new evidence that "was not previously presented to the detainee's CSRT" and that is "material to the factual question of whether the detainee" is an enemy combatant, the Deputy Secretary of Defense "will direct that a CSRT convene to reconsider the basis of the detainee's [enemy combatant] status in light of the new information." See *OARDEC Instruction 5421.1, Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status* paras. 4(a)(1) and (2), 5(b) (May 7, 2007) <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf>.

d. Petitioners assert (Br. 29-30; Al Odah Br. 36; El-Banna Br. 42-45) that the CSRT decisionmaker is not "neutral." But CSRT members cannot have been involved "in the apprehension, detention, interrogation, or previous determination of status" of the detainees and must swear an oath to discharge their duties faithfully and impartially. 06-1196 Pet. App. 142. That is more protective than Army Regulation 190-8, which includes no standard for neutrality. Furthermore, far from being a rubber stamp, the CSRT process has led to favorable determinations for 38 detainees. See *CSRT Summary*.

In petitioners' view, the CSRTs cannot fairly adjudicate individual cases because their members are military officers, and their superiors—the President and the Secretary of Defense—have stated that the detainees are enemy combatants. That argument ignores not only the dozens of cases in which favorable determinations were made for detainees but also the fact that the CSRT officers have been given orders, by the Deputy Secretary of Defense and the Secretary of the Navy, to make a "neutral" and independent evaluation of the status of each detainee. 06-1196 Pet. App. 142. They can therefore be expected to act as neutral decisionmakers by faithfully carrying out the role assigned to them by their superiors. Cf. *Yamashita*, 327 U.S. at 5 (noting that Army officers, in defending accused war criminal before military commission, "demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"). Moreover, petitioners' reasoning would preclude the use of *any* military tribunal to adjudicate enemy-combatant status, because all potential panelists would be subordinates of the President and the Secretary of Defense. Petitioners' theory is thus inconsistent with *Hamdi*'s recognition

that, even for citizens detained in the United States, a "military tribunal" can satisfy the due process requirement of a "neutral decisionmaker." 542 U.S. at 537-538 (plurality opinion).

e. Finally, petitioners argue (Al Odah Br. 37) that the DTA is inadequate because a "habeas court would not accept evidence procured through torture or coercion," whereas the "DTA permits such evidence." But the CSRT procedures require tribunals to assess whether the evidence is "relevant and helpful" and whether hearsay evidence is "reliab[le]." 06-1196 Pet. App. 158. Those rules permit the tribunals to reject unreliable evidence based on any concerns regarding coercion that may have arisen in the proceedings before them. To the extent the rules are deemed insufficient in any concrete situation to ensure that determinations are not based on coerced testimony, the District of Columbia Circuit can say so on DTA review in a case that actually presents such an issue.

4. Petitioners' objections to the scope of DTA review lack merit

a. Petitioners contend (Br. 29; Al Odah Br. 31-32) that they are entitled to "plenary" factual review of the basis for their detention. That is not the law. That is not what habeas has ever provided in the context of military detentions during wartime, and that is not what this Court found necessary for citizens detained in the United States. Instead, this Court has endorsed very limited, if any, habeas review of the factual findings of an Executive Branch tribunal. See *Hamdi*, 542 U.S. at 537 (plurality opinion) ("some evidence" standard); *St. Cyr*, 533 U.S. at 306 (same); *Yamashita*, 327 U.S. at 8 (no factual review at all). The DTA review standard is

more rigorous than either of those standards, as the court of appeals is authorized to determine whether the CSRT permissibly applied the requirement that its decision be "supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742.

b. Petitioners also suggest (Al Odah Br. 38) that the DTA is inadequate because they cannot challenge the "[l]egal basis for detention." That ignores the express statutory requirement that the court of appeals consider "whether the use of [the CSRT's] standards and procedures * * * is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. That provision allows a petitioner to argue that the CSRT standards and procedures—including the definition of an enemy combatant, 06-1196 Pet. App. 150—is inconsistent with the AUMF.

c. Petitioners contend (Br. 31; El-Banna Br. 45) that the CSRT process is not sufficiently speedy. There is no reason to accept that contention: the CSRTs were completed years ago. The first DTA actions were filed just over a year ago, and the District of Columbia Circuit has begun to outline the procedures governing its review, see *Bismullah*, 2007 WL 2067938, and moved to implement those procedures in many of the cases filed before it.[31] In addition, while petitioners are of course free to raise whatever appropriate legal challenges they like to existing procedures, the volume and nature of challenges that the detainees have made here also have had

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[31] The government filed a petition for rehearing en banc in *Bismullah* and requested expedited consideration of the petition so that it could determine what steps would be appropriate in the event that the District of Columbia Circuit does not reconsider its decision, including seeking review in this Court while these consolidated cases are pending before the Court. See note 16, *supra*.

an impact on the process. Moreover, in light of the lack of historical precedent for the use of habeas in this context, novel legal questions would (and did, pre-DTA) arise in habeas litigation as well. Indeed, it is unclear why habeas would have any comparative advantage in terms of relative speediness over DTA review.

d. Finally, petitioners argue (Br. 30; Al Odah Br. 39) that the DTA is deficient because the court of appeals lacks express authority to grant release. This argument overlooks the backdrop against which the DTA was enacted. When a CSRT has determined that a detainee is no longer an enemy combatant, the government has taken on itself to transfer the detainee out of Guantanamo Bay and United States custody. Thus far, every Guantanamo Bay detainee who has been determined no longer to be an enemy combatant has been released. See Notice of Transfer at 3, *Kiyemba* v. *Bush*, No. 05-5487 (D.C. Cir. filed Nov. 21, 2006).

In addition, contrary to petitioners' assumption, the result of a successful habeas petition generally is not immediate release; instead, it is often a remand for further proceedings. See, *e.g.*, *Chessman* v. *Teets*, 354 U.S. 156, 165-166 (1956); *Mahler* v. *Eby*, 264 U.S. 32 (1924). In the criminal context, for example, habeas courts frequently order a retrial with correct procedures. See *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987). Likewise, this Court did not order the petitioner in *Hamdi* released, even though the military had offered him no process at all to test the validity of his detention. Rather, the Court remanded to allow the application of appropriate procedures. See 542 U.S. at 539 (plurality opinion).

Ordering immediate release rather than a remand would be particularly inappropriate in this context,

given the primary role of the Executive in determining when military detention of the enemy is necessary and the sensitive diplomatic concerns raised by the transfer of aliens out of Guantanamo Bay to other countries. Moreover, the merits argument put forward by the petitioners—that the CSRTs misapplied the AUMF and violated procedural due process—would plainly call for remand rather than outright release, since the detainees might well be determined to be enemy combatants even under "correct" procedures and a different interpretation of the AUMF. In any event, petitioners may direct to the District of Columbia Circuit any arguments about the appropriate relief in the case (if any) in which such a detainee is not released.[32]

II. PETITIONERS' DETENTION IS LAWFUL

Petitioners further contend that their detention is unlawful because Congress did not authorize the detentions, and the detentions violate the Fifth Amendment. Those arguments have not been considered by the court of appeals. However this Court resolves the other issues in this case, this challenge should be addressed in the first instance by either the court of appeals under the DTA or the district court and the court of appeals in habeas. Either way, this Court could consider the issue after it has been fully litigated below.

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[32] If this Court concludes that the DTA affords an adequate substitute for any habeas corpus rights that petitioners might have, it could assume the applicability of the Suspension Clause without deciding the threshold question whether (or to what extent) Guantanamo Bay detainees enjoy any Suspension Clause rights. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677 (2006) ("Because we conclude that [petitioners] are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.").

There is no reason for the Court to act as a court of first view, rather than review, on these issues.

A. The AUMF Authorizes The Detention Of Enemy Combatants As Defined By The CSRT Process

Petitioners argue (Br. 33-44) that the AUMF does not authorize their detention. That argument rests on a misreading of the AUMF, is directly contradicted by this Court's construction of the AUMF in *Hamdi*, and misunderstands the law of armed conflict.

1. The AUMF authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" of September 11, 2001, "or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. In *Hamdi*, this Court held that the AUMF "clearly and unmistakably" authorized the detention of a citizen enemy combatant captured on the battlefield in Afghanistan. 542 U.S. at 519 (plurality opinion). The Court explained that "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11] attacks, are individuals Congress sought to target in passing the AUMF." *Id.* at 518. The same goes for individuals who are associates of al Qaeda itself.

One element of the use of force is the detention of those forces determined to be enemies. See *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'") (quoting *Quirin*, 317 U.S. at 28, 30). The CSRT defini-

tion of "enemy combatant" allows the detention of any "individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Pet. App. 81a. That definition reflects a reasonable implementation of the President's responsibility to "determine[]" the object of the use of force authorized by the AUMF.

2. Petitioners make several challenges to the definition of "enemy combatant," but none withstands scrutiny. First, petitioners argue (Br. 35-36) that the AUMF requires a specific nexus between each petitioner and the September 11 attacks. That argument finds no support in the text of the AUMF and is foreclosed by *Hamdi*, where this Court held that the AUMF authorized the detention of an individual who had associated with the Taliban but had no direct connection to September 11. 542 U.S. at 518 (plurality opinion).

Second, petitioners contend (Br. 37 n.34) that the AUMF imposes territorial limits on the battlefield and precludes the detention of persons found in friendly nations. But the language of the AUMF imposes no geographic limits on the President's authority to use force. Moreover, nothing in the law of armed conflict prevents a party to a conflict from taking custody of and capturing enemy combatants captured on the territory of a cooperating state. See, *e.g.*, *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 311 (1871). Indeed, in *Quirin*, this Court upheld the detention of enemy combatants apprehended within the United States. See *Hamdi*, 542 U.S. at 518 (plurality opinion) (discussing *Quirin*). And Hamdi himself was held in the United States. *Id.* at 510.

Third, petitioners assert that "support" for al Qaeda or the Taliban is not sufficient to authorize detention; instead, to be properly detained, an individual must "take a direct part in hostilities." Br. 39 (citations omitted). In support of that claim, they rely on *Hamdi*, which upheld the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 542 U.S. at 516 (plurality opinion). Nothing in *Hamdi* even remotely suggests, however, that the AUMF encompasses *only* those individuals.

Nor does the law of armed conflict suggest such an implied limitation. To the contrary, the laws of war—including the Geneva Convention—have long permitted the detention of members or supporters of hostile forces. See, *e.g.*, Winthrop 789 ("class of persons" subject to detention includes "civil persons * * * in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways"); Adjutant Gen.'s Off., War Dep't, *General Orders No. 100, Instructions for the Government of Armies of the United States in the Field*, 7 (1863) (Art. 15) ("Military necessity * * * allows of the capturing" of "every armed enemy" and, in addition, "every enemy of importance to the hostile government, or of peculiar danger to the captor."); J. Baker & H. Crocker, *The Laws of Land Warfare Concerning the Rights and Duties of Belligerents as Existing on August 1, 1914*, at 35 (1919) ("Persons belonging to the auxiliary departments of an army * * * such as commissariat employees, military police, guides, balloonists, messengers, and telegraphists * * * are still liable to

capture."); Geneva Convention Art. 4(A)(4), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (prisoners of war include "[p]ersons who accompany the armed forces without actually being members thereof, such as * * * war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); *id.* Art. 33, 6 U.S.T. at 3344, 75 U.N.T.S. at 162 (permitting the retention of "medical personnel and chaplains").

Thus, the laws of war allow for detention not only of uniformed members of an armed force, but also of those persons supporting the enemy. See *Eisentrager*, 339 U.S. at 765 (noting petitioners' allegation that "their employment * * * was by civilian agencies of the German Government" but concluding that their "exact affiliation is * * * for our purposes immaterial"); *Miller*, 78 U.S. (11 Wall.) at 312 ("[N]o recognized usage of nations excludes from the category of enemies those who act with, or aid or abet and give comfort to enemies, whether foreign or domestic."). That rule has always been sensible; today, it is essential. Congress has authorized a war against an international terrorist organization with no uniformed soldiers, and the detention of its members and supporters is a critical component of any such war.

Petitioners cite (Br. 39-41) certain rules of engagement governing the targeting of civilians in war zones for violent attack. But the capture and detention of enemy combatants is a fundamental incident of warfare. Thus, as petitioners concede (Br. 41 n.41), the military may clearly detain an enemy soldier even in circumstances where the use of deadly force might not be appropriate because, for example, he has surrendered. Likewise, if a member or supporter of al Qaeda is not

brandishing a weapon, the rules of engagement might preclude the use of lethal force against that person, but they do not bar his detention as an enemy.

Ultimately, much of petitioners' argument rests on the flawed premise (Br. 39) that they are "civilians." But a member or supporter of an entity engaged in armed conflict against the United States is not, in any relevant sense, a "civilian." Al Qaeda is unquestionably such an entity—as recognized by Congress, see AUMF § 2(a), 115 Stat. 224; the President, see *Military Order of Nov. 13, 2001*, 3 C.F.R. 918 (2001); America's allies, see, *e.g.*, Statement of Lord Robertson, NATO Sec'y Gen. (Oct. 2, 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm> (describing the September 11 attack as an "armed attack" under Article 5 of the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246); and al Qaeda itself, see, *e.g.*, World Islamic Front, *Jihad Against Jews and Crusaders* (Feb. 23, 1998) <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>. The AUMF plainly authorizes petitioners' detentions.

3. Finally, even apart from the AUMF, petitioners' detention is independently justified by the President's constitutional authority. By its terms, Article II of the Constitution vests "[t]he executive Power" of the United States in the President, whom it designates as the "Commander in Chief of the Army and Navy of the Unites States." U.S. Const. Art. II, §§ 1, 2. Construing those provisions, this Court has long held that the President, as Commander in Chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming* v. *Page*, 50 U.S. (9

How.) 603, 615 (1850); see, *e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668, 670 (1863); *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."). In adopting the AUMF, Congress itself recognized that "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism." AUMF Preamble, 115 Stat. 224 (emphasis added).

As in *Hamdi*, see 542 U.S. at 518 (plurality opinion), however, there is no need here for the Court to decide the President's ability to act without congressional backing. The AUMF clearly authorizes these detentions and therefore this is a circumstance where the President acts pursuant to his own long-recognized authority and congressional authorization and so "his authority is at its maximum." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (*Youngstown*). His actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily on any who might attack it." *Id.* at 637 (Jackson, J., concurring). Petitioners have not come close to meeting that burden here.

B. Petitioners' Detention Does Not Violate The Due Process Clause

Petitioners contend (Br. 44-49) that their detention violates the Fifth Amendment. That contention fails for two independent reasons. First, as aliens captured and held outside the sovereign territory of the United

States, petitioners have no due process or other constitutional rights. Second, petitioners have been afforded a level of process that would be sufficient in the extraordinary circumstances of this case even if the Fifth Amendment were applicable.

1. It is well established that the Fifth Amendment, including its Due Process Clause, does not apply to aliens who have no presence in any territory over which the United States is sovereign. See *Eisentrager*, 339 U.S. at 784-785. In *Verdugo-Urquidez*, the Court stated that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" in "emphatic" terms. 494 U.S. at 269; see *id.* at 275 (Kennedy, J., concurring); *Zadvydas*, 533 U.S. at 693 (The "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States.). *Eisentrager* and its progeny make clear that the applicability of the Fifth Amendment to aliens turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. See *Verdugo-Urquidez*, 494 U.S. at 269 (aliens are not "entitled to Fifth Amendment rights outside the *sovereign* territory of the United States" (emphasis added)). Accordingly, for the same reason that there is no constitutional right to habeas here, the Fifth Amendment also does not protect petitioners. See pp. 15-25, *supra*.

As discussed above, nothing in *Rasul* upset the constitutional holding of *Eisentrager*. Petitioners nonetheless point (Br. 45) to a single footnote in *Rasul*, which states: "Petitioners' allegations * * * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." *Rasul*, 542 U.S. at 483 n.15. That footnote, however,

cannot possibly be read as an implicit repudiation of the substantive holdings in *Eisentrager*, *Verdugo-Urquidez*, and their numerous predecessors and progeny. Such a reading would be inconsistent with the repeated assurances throughout *Rasul* that habeas jurisdiction was the "only" question raised in or resolved by the Court. Moreover, footnote 15 is appended to a paragraph focused entirely on the question of statutory jurisdiction under 28 U.S.C. 2241, and to a sentence describing what "[p]etitioners contend" for jurisdictional purposes. *Id.* at 483. To say that these allegations are sufficient for *jurisdictional* purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not "wholly insubstantial" or "frivolous" on the merits. See, *e.g.*, *Steel Co.*, 523 U.S. at 89; *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). On the other hand, to construe footnote 15 as implicitly overruling the *substantive* Fifth Amendment holding of *Eisentrager*, thereby jettisoning decades of settled law in a single ambiguous sentence (and all in an opinion that went to length to distinguish as outmoded, but not to overrule, the statutory holding of *Eisentrager*), would be implausible in the extreme. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

Petitioners also claim support (Br. 44-50) from the *Insular Cases*; the splintered opinion in *Reid* v. *Covert*, 354 U.S. 1 (1957); and Justice Kennedy's concurring opinion in *Verdugo-Urquidez*. Petitioners misread each of those opinions. The *Insular Cases* do not support petitioners' claim to Fifth Amendment protection because those cases addressed whether certain constitutional

and federal statutory provisions were applicable in territories that had been ceded to the United States and over which the United States therefore was sovereign. See, *e.g.*, *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922); Treaty of Peace, Dec. 10, 1898, U.S.-Spain, Art. II, 30 Stat. 1754 (Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies"). As discussed, Guantanamo Bay is Cuban—not United States—territory. In any event, to the extent the *Insular Cases* could be applied, they suggest that any Fifth Amendment analysis of petitioners' detention would have to take into account the unique circumstances of their overseas detention.[33]

Petitioners' reliance on *Reid* is also misplaced. Petitioners in *Reid* were United States citizen spouses of members of the military tried by courts-martial for crimes committed on United States military bases overseas. The Court addressed the question whether these spouses could invoke the Fifth and Sixth Amendments. A plurality of the Court concluded that "citizens abroad" are generally protected by the Bill of Rights. See 354 U.S. at 5-6. The narrower controlling opinions agreed with respect to the Fifth and Sixth Amendments but, even as to the rights of citizens, cautioned against wholesale extraterritorial application of the Constitution. See *id.* at 75 (Harlan, J., concurring in the judgment). Moreover, in *Verdugo-Urquidez*, a majority of the Court specifically rejected the proposition that *Reid* has any bearing on the constitutional rights of aliens. See 494 U.S. at 270. In reaffirming *Eisentrager*'s "emphatic" rejection of extraterritorial application of the

[33] Petitioner El-Banna (Br. 21) cites additional cases that are equally inapplicable because they address constitutional rights of aliens located *within* the United States.

Fifth Amendment to aliens, the Court specifically limited *Reid* to the proposition that "*citizens* stationed abroad could invoke the protection of the Fifth and Sixth Amendments." *Id.* at 269-270 (emphasis added).

Petitioners further err in claiming support from Justice Kennedy's concurrence in *Verdugo-Urquidez*. In that case, Justice Kennedy joined in full a majority opinion that expressly reaffirmed the "emphatic" Fifth Amendment holding of *Eisentrager*. 494 U.S. at 269. The opinion of the Court authored by the Chief Justice in *Verdugo-Urquidez* was just that: an opinion for the Court. Justice Kennedy's concurrence in that majority opinion obviously informs his own concurring opinion. In any event, even on its own terms, his *Verdugo-Urquidez* concurrence does not help petitioners here. In that opinion, Justice Kennedy observed that *Eisentrager*, and not *Reid*, governs "extraterritorial application of the Constitution" where the "person claiming its protection is * * * an alien." *Id.* at 275. Moreover, citing the controlling concurrence in *Reid*, he stressed that even citizens do not necessarily enjoy the full measure of constitutional rights abroad, and, citing the *Insular Cases*, he stressed that Congress need not "implement all constitutional guarantees" even "in its territories." *Id.* at 277-278. Finally, he noted the unexceptional proposition that the Fifth Amendment would apply to aliens wherever apprehended during a domestic criminal trial in an Article III court. See *id.* at 278.[34]

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[34] Petitioners contend (El-Banna Br. 48-49) that they also wish to assert claims under Article 3 of the Geneva Convention, 6 U.S.T. at 3318, 75 U.N.T.S. at 136. That provision governs the treatment of detainees; it does not confer any right to release, let alone a right that would be privately enforceable in a habeas action. See *Hamdan*, 126 S. Ct. at 2794, *Eisentrager*, 339 U.S. at 789 n.14. In addition, several

2. Even if the Fifth Amendment had some limited application to aliens held at Guantanamo Bay, the CSRT process and judicial review available under the DTA would readily satisfy any due process requirements for detaining such aliens as enemy combatants. Assuming that such aliens have any due process rights at all, those rights are plainly less extensive than those of American citizens in this country. See *Eisentrager*, 339 U.S. at 769; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952) ("War, of course, is the most usual occasion" for distinguishing between the rights of aliens and citizens.). As explained above, see pp. 49-52, *supra*, the CSRTs exceed the due process requirements that the *Hamdi* plurality said would be constitutionally sufficient even for American citizens held in this country. *A fortiori*, they are constitutionally sufficient for alien enemy combatants held overseas.

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amici suggest that petitioners' detention violates the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95th Cong., 2d Sess. (1978), 999 U.N.T.S. 171 (ICCPR). But this Court has held that the ICCPR does not "create obligations enforceable in the federal courts," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004), and in any event the ICCPR applies only within the "territory" of member nations. Art. 2.1, S. Exec. Doc. E at 24, 999 U.N.T.S. at 173. That limitation was drafted precisely to foreclose application of the ICCPR to areas such as "leased territories," where a signatory country would be acting "outside its territory," although perhaps "technically within its jurisdiction for certain purposes." *Summary Record of the 138th Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg. at 10, U.N. Doc. E/CN.4/SR.138 (1950). Since becoming a party to the ICCPR, the United States has consistently interpreted the treaty in this manner. See *Summary Record of the 1405th Meeting*, U.N. ESCOR Hum. Rts. Comm., 53d Sess., 1504th mtg. at 3, 6-7 (paras. 7, 20), U.N. Doc. CCPR/C/SR.1405 (1995).

C. Petitioners' Selective Reliance On Foreign Law Is Unavailing

Finally, petitioners rely (Br. 49-50) on the procedures that Israeli courts have held must be provided to suspected terrorists. Those procedures are not relevant in construing either the Suspension Clause or the Due Process Clause, because, *inter alia*, the history of our Constitution is unique and the role of the courts in Israel is very different from the role of the courts under our Constitution. For example, the Israeli Supreme Court has the power to order the Prime Minister to dismiss members of his cabinet upon mere accusations of misconduct. See H.C. 3094/93, *Movement for Quality Gov't in Israel* v. *Israel*, 47(5) P.D. 404.

In a legal system such as Israel's, it is perhaps not surprising that the courts engage in a level of superintendence of ongoing military operations that would be unthinkable in our country. For example, Israeli courts have reviewed the quantity of supplies that the army allows to reach forces it is besieging, see H.C. 3451/02, *Almandi* v. *Minister of Def.*, 56(3) P.D. 30. In the United States, by contrast, Congress is vested with the power to declare war, see U.S. Const. Art. I, § 8, Cl. 11, and the President is the Commander in Chief of the armed forces, see *id.* Art. II, § 2, Cl. 1. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1998) (noting the reluctance of the courts "to intrude on the authority of the Executive in military and national security affairs"); *Youngstown*, 343 U.S. at 587 (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

In any event, even if recent foreign law were an appropriate benchmark for evaluating the scope of the Suspension Clause, the procedures used by Israel for

detentions, whether within its sovereign territory or within the occupied territories—which are connected to Israel's sovereign territory—are hardly an appropriate, much less controlling, comparison for evaluating the detention of enemy combatants captured by the military on another continent, and held overseas in a country that the United States does not occupy and uses only under the terms of a lease that reserves sovereignty to the lessor—Cuba.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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